Supreme Court, U. S.
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IN THE

Supreme Court of the United States

No. 78-673

WILLIE DEWITT DAWSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

Petitioner, Willie Dewitt Dawson, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals, Fifth Circuit, entered July 14, 1978, affirming his conviction of bank robbery as charged in the indictment, and that on hearing the judgment of conviction be reversed.

OPINION BELOW

The opinion of the United States Court of Appeals, Fifth Circuit (App. A., infra, p. 1a) has not been reported.

JURISDICTION

The judgment of the United States Court of Appeals was entered on July 14, 1978. A timely application for rehearing was filed and was overruled on September 21, 1978 (App. C., infra., p. 1c).

This Court has jurisdiction under 28 U.S.C., Paragraph 1257.

QUESTIONS PRESENTED

1. Whether alternative allegations stated in a single count of an indictment denied petitioner his right to be informed of the nature of the charges against him, as is required by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

2. Do the facts in this case constitute a fatal variance necessitating the allowance of defendant's motion for acquittal at the conclusion of the government's case?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth and Sixth Amendments to the Constitution of the United States (See Appendix C., infra, p. 1c).

STATEMENT OF THE CASE

The defendant in this case was charged with bank robbery and was convicted in the United States District Court for the

Northern District of Alabama of the charge and was then sentenced by the Judge for a term of twelve (12) years. The defendant thereupon appealed the case to the United States Court of Appeals, Fifth Circuit, where the Judgment and sentence was affirmed. He petitioned for rehearing and rehearing was denied by the Court of Appeals on September 21, 1978.

The one count indictment for which he was convicted alleged that:

> "That on or about September 26, 1974 within the Northern District of Alabama, the defendant, aided and abetted by Gordon A. Harrell, Jr., Gerald Jenkins and others who are not indicted herein by force and violence and intimidation did take from the person and presence of Jerelene Roberson about $15,569.00 in money belonging to and in the care, custody, control, management and possession of the First National Bank of Russellville, Alabama, Vina Branch, Vina, Alabama, the deposits of which were insured by the Federal Deposit Insurance Corporation. And Gerald Jenkins in committing the aforesaid offense did assault one, Barbara Richardson, and did put in jeopardy the life of the said Barbara Richardson by means of a dangerous weapon, that is to say, a gun."

According to the above allegations the defendant was charged as a principal in the first degree or in other words as the perpetrator of the offense charged in violation of 18 U.S.C.A., Paragraph 2310, which charges robbery of a Federally Insured Bank, aggrevated by assault.

In the allegations of the indictment, Gordon A. Harrell, Jr. and Gerald Jenkins are named as the aiders and abettors of the defendant as principal. All of the evidence in the case show them to be the actual perpetrators of the offense and there was a complete absence of evidence to support the verdict returned by the jury (Tr. 623).

Prior to trial on July 13, 1977 Appellant filed a motion to dismiss the charge against him on the grounds that there was no evidence presented to the Grand Jury upon which the indictment could be based (Cr. 5). The magistrate recommended denial of the motion.

On July 13, 1977 the defendant filed a motion for a Bill of Particulars (Cr. 6), which was denied by the magistrate. On July 14, 1977 appellant filed appeal from the rulings on all of these motions.

The Trial Judge in his charge to the jury limited it to "aiding and abetting" and stated to the jury in his charge that "the defendant here is charged with aiding and abetting the principals with robbery of the Vina Bank" (Tr. 614).

Only two forms of verdict were presented to the jury at the conclusion of the case, one being "we the jury find the defendant not guilty", and the other being, "we the jury find the defendant guilty as charged in the indictment" (Tr. 623). These two forms were prepared and submitted to the jury by the court and the jury was never given the opportunity to find the defendant guilty of aiding and abetting in accordance with the Court's oral charge.

In other words the defendant was found guilty as a principal in the first degree and as the actual perpetrator of the offense when there was no evidence in the case to this effect, the evidence being that if the defendant was guilty of anything he was guilty of aiding and abetting in a very slight degree, was not present at the scene of the bank robbery and according to the evidence was at his home in another county some fifty (50) miles away at the time the bank was robbed.

After the government had rested its case the defense counsel made a motion for acquittal on the grounds of fatal variance based on the evidence or a lack of evidence in that the government had not proved a prima facia case. This

motion was overruled by the Court (Tr. 413).

The conviction of the defendant was appealed to the United States Court of Appeals where the conviction was affirmed on July 14, 1978 (see the opinion of the United States Court of Appeals, App. A., infra). This opinion has not been reported. In this opinion the defendant is referred to as being convicted of aiding and abetting a bank robbery, when in fact the Lower Cout by refusing to submit a form of verdict for aiding and abetting the Court denied the defendant such right to be so convicted.

REASONS FOR GRANTING THE WRIT

1. The Court of the United States Court of Appeals, Fifth Circuit, departed on the rule that a criminal offense be charged with such certainty as is necessary to apprise the defendant of the nature of the charge against him and to protect the defendant from being put in jeopardy for the same offense in the event future action is taken against him.

The indictment in this case charges the Petitioner with the offense of bank robbery. That is, he is apparently charged as the perpetrator of the actual offense and as a principal in the first degree and the indictment alleges that the Petitioner was aided and abetted by Gordon A. Harrell, Jr. and Gerald Jenkins who were, in fact, the actual perpetrators of the crime. From aught that appears the grand jury certainly knew this, of course, there has to be a perpetrator and proof of the actual offense before there can be a conviction of the offense of aiding and abetting. The name of the perpetrator need not be known or alleged but someone must be alleged as the perpetrator. Thus in this case the Petitioner was alleged to be the perpetrator. In the proof there was a complete absence of

evidence to support the offense charged or the verdict returned by the jury. On the contrary the petitioner was at his home some fifty (50) miles away at the time of the robbery and his participation in the robbery was very slight if at all. It would appear that the members of the grand jury knew who were the actual perpetrators of the offense charged and also knew that the Petitioner was not involved as a perpetrator thus it appears that the defendant is not charged with certainty and does not inform the accused of the nature of the charge against him in violation of his Constitutional Rights. *Hamling v. United States, 418, U.S. 87. Russell v. United States, 369, U.S. 749.*

2. Do the facts in this case constitute a fatal variance necessitating the allowance of defendant's motion for acquittal at the conclusion of the government's case?

To further confuse the defendant and his attorneys as to the nature of the charge the court orally charged the jury on the alternate offense of aiding and abetting. We understand that under the provisions of *18 U.S.C.A., Paragraph 2,* which states in effect that whoever commits an offense against the United States and who aids and abetts its commission is punished as a principal, that a person can be charged as a principal and convicted of aiding and abetting and to the contrary can also be charged with the offense of aiding and abetting and be convicted by the jury as a principal. But in this case for an aider or abettor (as the proof showed the Petitioner to be) to be punishable as a principal the proof must encompass the same elements as would be required to convict any other principal. *United States of America v. Short, 493 Federal Reporter, 2nd Series, page 1170. Hernandez v. United States, 300 Federal 2nd, 114. United States v. Greer, 467 Federal 2nd, 1064.* That is to say before the Petitioner could be convicted for bank robbery

the elements of the offense must be shown to have been committed by the Petitioner beyond a reasonable doubt.

Now as I have stated the Court orally charged the jury of aiding and abetting but then prepared two forms of verdict for the jury, one being "we the jury find the defendant not guilty as charged in the indictment" and the other being "we the jury find the defendant guilty as charged in the indictment". These two charges limited the jury to finding of the Petitioner guilty to only one offense and in fact the verdict could be said to be a directed verdict against allowing the defendant to be found guilty of aiding and abetting. By this time confusion and vagueness were in the minds of the defendant and attorneys to such an extent that they did not know what the defendant was charged with or what was proven. Even the United States Court of Appeals referred to the defendant throughout its opinion as being convicted of aiding and abetting.

After the conclusion of the evidence before the government the Appellant moved for an acquittal on the grounds of a fatal variance between the allegations contained in the indictment and the proof. The motion was overruled by the Court.

The United States Court of Appeals held that because of the defendant's failure to renew Motion for Acquittal after all the evidence in the case had been presented, waived that motion. In reply to such decision of the Court of Appeals attention is called to the case of *Stephen v. United States, 354 Federal 2nd, 999 (Fifth Circuit),* where the Court held that "where ruling on motion for acquittal was reserved until conclusion of the evidence but motion was not renewed and there was no ruling on it the reviewing court must consider state of the evidence when motion was made and test is whether reviewing presented most favorable to the govern-

ment a reasonable minded jury could accept the relevant and admissible evidence as adequate and sufficient to support conclusion of guilt beyond a reasonable doubt." Citing *Riggs v. United States (Fifth Circuit), 280 Federal 2nd, 947.*

CONCLUSION

The Petition for a writ of Certiorari should be granted.

Respectfully Submitted,

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APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

Willie Dewitt DAWSON,
Defendant-Appellant.

No. 78-5027
Summary of Calendar.*

United States Court of Appeals,
Fifth Circuit.

July 14, 1978.

Defendant was convicted in United States District Court for the Northern District of Alabama, James Hughes Hancock, J., of aiding and abetting a bank robbery and he appealed. The Court of Appeals, James C. Hill, Circuit Judge, held that: (1) the evidence was sufficient to sustain the conviction; (2) admission of testimony that, sometime before the robbery, the defendant hid another one of the robbers while he was a fugitive from justice, was harmless error; (3) the Government introduced sufficient nonhearsay evidence to establish a prima facie case of conspiracy and to allow admission of evidence under the coconspirator hearsay exception, and (4) the trial court was not required to charge the jury sua sponte that mere knowledge that a crime has been committed is insufficient to support a conviction for aiding and abetting.

Affirmed.

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*Rule 18, 5 Cir.; see *Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al.*, 5 Cir. 1970, 431 F.2d 409, Part I.